

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
May 12, 2009 Session

**STATE OF TENNESSEE v. MELISSA STRICKLIN**

**Appeal from the Circuit Court for Wayne County  
No. 14007 Stella Hargrove, Judge**

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**No. M2008-01455-CCA-R3-CD - Filed August 10, 2009**

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The Defendant, Melissa Stricklin, was charged with two counts of vehicular homicide by intoxication, a Class B felony. See Tenn. Code Ann. § 39-13-213(b)(2). She was tried by a jury and found guilty as charged. In this direct appeal, she contends that: (1) the State presented evidence insufficient to support the jury's verdicts of guilty beyond a reasonable doubt; (2) the trial court erred by allowing the jury to review selected portions of a witness' testimony; (3) the trial court erred by allowing testimony regarding federal methamphetamine law; (4) she was prejudiced by untrue testimony; (5) the State committed prosecutorial misconduct in its opening statement; (6) the trial court erred in failing to admit one victim's blood test results and in failing to provide those results to the jury during deliberations; and (7) the trial court erred in denying alternative sentencing. After our review, we affirm the judgments of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed**

DAVID H. WELLES, J., delivered the opinion of the court, in which ALAN E. GLENN and ROBERT W. WEDEMEYER, JJ., joined.

J. Daniel Freemon, Lawrenceburg, Tennessee, for the appellant, Melissa Stricklin.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany Faughn, Assistant Attorney General; Mike Bottoms, District Attorney General; and Doug Dicus, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**Factual Background**

The events giving rise to this case occurred on July 3, 2005. As its first witness at trial, the State called Tennessee Highway Patrol Trooper Eddie Nutt, whom it certified as an expert in crash reconstruction. He testified that on the evening of July 3, he was called to the scene of an injury accident on Highway 13 in front of Dale's Market ("Dale's"), between Waynesboro and

Collinswood. Dale's was located along the southbound lane of Highway 13, a two-lane road marked at that point with double yellow lines. Trooper Nutt arrived at 10:09 p.m. As he drove up, he observed what appeared to be a dead body in the middle of Highway 13. He also saw a motorcycle in two pieces in the roadway, as well as a sport utility vehicle ("SUV") parked on the edge of the Dale's parking lot with damage to its front passenger-side fender, door, and window. Following fatality accident procedure, he contacted his supervisor. Trooper Nutt also noticed paramedics working on a female lying in a ditch fifteen to twenty feet from the crash site. She was later transported to Wayne Medical Center, where she died. The victims were identified as Brian Dickey, who was the driver of the motorcycle, and Nichole Maynard, who was a passenger on the motorcycle.

He spoke to the Defendant and Tony Pitts, the occupants of the SUV at the time of the crash, both of whom remained on the scene. The Defendant had been driving and Mr. Pitts had occupied the front passenger seat. The Defendant told Trooper Nutt that when the crash occurred, she had been turning left into Dale's from the northbound lane, which required her to cross the southbound lane of traffic.

Trooper Nutt smelled the odor of alcohol on the Defendant, who said she had consumed only a few sips of vodka at about 3:00 p.m. Trooper Nutt noted that the odor seemed to come from the Defendant's clothes rather than her breath, and he later determined that some of Mr. Pitts' beer had spilled on the Defendant. The Defendant told Trooper Nutt she had not consumed any medication or illegal substance. On his Driving Under the Influence Report, Trooper Nutt noted that besides evident crying and anxiety, the Defendant acted normal. He recorded her eyes, clothing, walking, and speech as normal. Trooper Nutt noticed a stronger odor of alcohol on Mr. Pitts and saw a can of Busch beer under the SUV's driver's seat. He contacted the Highway Patrol's Critical Incident Response Team ("CIRT") and requested their presence. Because he did not have time and knew that the Defendant's blood would be tested in any event, Trooper Nutt did not direct her to perform any field sobriety tasks. Trooper Nutt then tried to control the forty-person crowd that had gathered around the scene. He also determined which of the bystanders had witnessed the crash. Six to eight of them said they had; Trooper Nutt asked the rest of the bystanders to leave.

Trooper Nutt later read the Defendant the implied consent form requesting a blood sample. She signed it and went with Trooper Nutt to Wayne Medical Center, where Trooper Nutt witnessed her blood being drawn at 12:15 a.m. He took possession of the sample and delivered it to a secure evidence box at the Waynesboro Highway Patrol post. His sergeant, the only person with access to the evidence box, later signed out the blood sample and delivered it to the Tennessee Bureau of Investigation ("TBI") for testing.

As to his other observations of the crash site, Trooper Nutt testified that the impact "obviously" occurred in the southbound lane, the victims' lane of travel. His measurements indicated a 950-foot unbroken line of sight when facing northbound from the crash site, a distance that would take about ten seconds to traverse at sixty miles per hour. Trooper Nutt also introduced into evidence a number of photographs of the crash site, noting a skid mark made by the victims'

motorcycle, a Yamaha YZF-R1. He also testified that because Mr. Dickey's body had collided with the Defendant's SUV rather than being thrown forward, he could not determine the motorcycle's speed at the time of impact. He noted that there were no street lights in the crash area but that there were a number of lights in the Dale's parking lot. The motorcycle's headlight was too damaged to determine whether it had been lit at impact, although Mr. Pitts told Trooper Nutt he thought the motorcycle's headlight was not on.

Special Agent Jennifer Hall, a TBI forensic scientist, tested the Defendant's blood sample. After being certified as an expert in forensics, she testified that the sample had a blood alcohol content of zero percent. Agent Hall detected two drugs, however: .1 micrograms per milliliter of methamphetamine and 27.5 nanograms per milliliter of a metabolite of marijuana. Agent Hall noted that the marijuana metabolite was inactive, meaning it could not have impaired the Defendant in any way. She also noted that .1 micrograms per milliliter of methamphetamine was at the upper end of the test results she had seen in her work at the TBI, but she did not recall the highest blood level she had ever tested.

As to the effects of .1 micrograms per milliliter of methamphetamine, Agent Hall said that methamphetamine has a therapeutic level of .01 to .05 micrograms per milliliter, the therapeutic level being the point at which a particular drug has its intended effect in medical treatment. Agent Hall testified that methamphetamine's therapeutic level was computed based on its effectiveness in treating attention-deficit disorder, attention-deficit/hyperactivity disorder, and narcolepsy. Methamphetamine use produces a "high" followed by a "crash," but Agent Hall noted that a person's motor skills, impulse control, reaction time, and ability to multitask can be affected during either phase. On cross-examination, Agent Hall confirmed that she could not testify about the effects of methamphetamine on a particular person based solely on blood levels. She also could not determine how recently the Defendant had used methamphetamine.

Bruce Levy, Tennessee's chief medical examiner, was certified as an expert in forensic pathology. Having reviewed the victims' autopsy reports, Dr. Levy testified that Mr. Dickey and Ms. Maynard were killed by multiple blunt force injuries. Mr. Dickey had no drugs or alcohol in his system. The trial court denied the Defendant's request to introduce information about Ms. Maynard's blood test results; the Defendant thereafter, in an offer of proof out of the jury's presence, elicited testimony from Dr. Levy that Ms. Maynard had .948 micrograms per milliliter of methamphetamine in her blood, plus .354 micrograms per milliliter of an active metabolite of methamphetamine. Dr. Levy agreed that it was roughly correct to add those two numbers together to determine the total blood level of methamphetamine. After calling the jury back in, the Defendant was allowed to question Dr. Levy about a hypothetical case involving Ms. Maynard's methamphetamine levels; Dr. Levy affirmed that such levels, some thirteen times greater than the Defendant's, were not unusual in his practice.

Dr. Levy also reviewed the Defendant's blood test. He testified that studies on methamphetamine use demonstrate that a person begins to show medically detectable changes at about .025 micrograms per milliliter. This includes behavioral changes, which can be difficult for

an average onlooker to observe. Dr. Levy testified that behavioral changes would be expected at .1 micrograms per milliliter, and that an average person would be impaired at that level. Although he believed that level of methamphetamine would necessarily have had some effects, he could not speculate as to what those effects would have been. He also expressed his opinion that any person with a blood level of .1 micrograms per milliliter of methamphetamine would necessarily be under the drug's influence, but only in the medical sense that such a level would affect a person in some detectable physical way.

The State also presented testimony from a number of eyewitnesses, including three members of a group of motorcyclists that had stopped at Dale's: Jesse Holloway, Maggie Lynnville, and Tim Cosby. These witnesses each testified that they arrived at Dale's after attending a fireworks show. Each stood in the Dale's parking lot when the crash occurred and witnessed Mr. Dickey's motorcycle traveling toward them at fifty-five to sixty miles per hour. When he was thirty to forty feet from Dale's, Mr. Dickey "pulled his clutch" and revved his engine as a greeting to the group of motorcyclists in the parking lot. Because he had engaged his motorcycle's clutch, he did not speed up. Mr. Dickey briefly glanced at the group as he passed the store, and some members of the group raised a hand to return his greeting. The witnesses agreed that Mr. Dickey's headlight was on and that he and Ms. Maynard wore helmets.

The impact with the Defendant's SUV occurred immediately after Mr. Dickey looked back at the road. The witnesses agreed that the crash occurred in the victims' lane, although none of them could say whether the Defendant had used her turn signal. Upon impact, Ms. Lynnville saw Mr. Dickey and his motorcycle lurch a few feet straight into the air before returning to the pavement. She did not see what happened to Ms. Maynard. Mr. Holloway yelled to a friend to call 911 before checking on Mr. Dickey and helping to stop traffic. He determined that Mr. Dickey was dead. Ms. Lynnville and Mr. Cosby searched for Ms. Maynard; they found her "twisted up," covered in blood, and struggling to breathe in a nearby ditch.

The witnesses also observed the Defendant exit her vehicle and walk behind it after the crash. She then got back into the SUV and pulled it into Dale's parking lot. Ms. Lynnville and other witnesses said the Defendant was not crying and did not try to help. None of the witnesses who saw the Defendant observed any actions on her part evidencing impairment or intoxication.

The State presented two other witnesses to the crash: Caleb Creasy and C.J. Hammick. Both corroborated the accounts given by Mr. Holloway, Ms. Lynnville, and Mr. Cosby. Mr. Creasy testified that he checked Mr. Dickey after the crash and also found Ms. Maynard lying about twenty feet away in a ditch. He noted that the Defendant seemed not to display any urgency about the situation, but also said that she had no trouble walking and did not seem impaired. Mr. Hammick, who had traveled to Dale's in the same car as Mr. Creasy, agreed about the details of the crash and the Defendant's apparent lack of impairment.

After being certified as an expert in crash reconstruction, Trooper Shawn Boyd of the Tennessee Highway Patrol's CIRT testified that he arrived at Dale's at 12:24 a.m. on July 4, 2005.

He walked the scene after conferring with Trooper Nutt, noting Mr. Dickey's covered body and the location where Ms. Maynard had been found before her evacuation to Wayne Medical Center. He testified that the area had a posted speed limit of fifty-five miles per hour.

The site of the crash showed a skid mark on the road, as well as scrapes and gouges in the pavement at the point of impact. The victims' motorcycle's front spoke and wheel had been torn off; the Defendant's SUV had damage to its suspension and its front passenger-side quarter-panel, as well as a flat front passenger-side tire. Trooper Boyd also noted that the victims' motorcycle had an automatic headlight, meaning that Mr. Dickey would not have had the option of turning it off. Trooper Boyd did not speak to the Defendant or her passenger. None of the witnesses said anything about another vehicle traveling in front of the victims in the southbound lane before the crash.

The State then rested its case. After the trial court's denial of her motion for judgment of acquittal, the Defendant put on proof. Allan Parham, a civil engineer and owner of Parham Engineering Consultants, was certified as an expert in crash reconstruction. He examined the accident report, CIRT report, CIRT diagram, photographs, medical documentation, witness statements, and toxicology report arising from the crash.

Mr. Parham agreed with the State that the crash was caused by the Defendant's SUV turning into the victims' lane of travel. He did not see evidence that intoxication was a factor in the crash, however, because the scene was typical of what he characterized as the most common type of impact between a car and motorcycle. He testified on cross-examination that the crash scene was also not inconsistent with intoxication. The sixty to seventy-five degree turn made by the Defendant's SUV was consistent with low speed; he estimated the SUV's speed at eight to twelve miles per hour. Unlike the State's experts, he offered an opinion on the victims' motorcycle's speed, based on the skid marks and position of Ms. Maynard's body after the crash, testifying that the motorcycle was traveling a minimum of fifty to sixty miles per hour at the time of impact. He also opined that Mr. Dickey's decision to glance in the direction of the Dale's parking lot did not cause the crash but may have contributed to its fatal results by depriving Mr. Dickey of braking time.

Doctor Murray Smith, certified as an expert in internal medicine and addiction medicine, also testified for the Defendant. He examined the accident report, Mr. Dickey's autopsy report, and the victims' and Defendant's blood tests. He testified that methamphetamine, because it is illegal, has no established therapeutic level. He also testified that .1 micrograms per milliliter is not a particularly high level of methamphetamine, and that methamphetamine only becomes detectable when it reaches a level of .05 micrograms per milliliter. Dr. Smith stated that he would not expect any abnormal reflexes or behavior in a person with a methamphetamine blood level of .1 micrograms per milliliter. Dr. Smith was not familiar with Dr. Levy's study showing medical impairment in people with methamphetamine blood levels of .025 micrograms per milliliter. He also could not provide the name of a medical text or study concluding that .1 micrograms per milliliter would not result in impairment; he stated that he had extensive experience with methamphetamine users, however. He based his conclusions on that experience and noted that he routinely saw methamphetamine levels many times higher than the Defendant's in his practice.

Tony Pitts, the Defendant's passenger at the time of the crash, also testified. He spent most of July 3, 2005, with the Defendant. The two had spent some time at a "creek party" on a relative's property. Mr. Pitts said that the Defendant did not drink or do drugs that day, although he noted she went to the store without him during the party. He observed no change in the Defendant's demeanor throughout the day, however. At about 5:30 or 6:00 p.m., Mr. Pitts and the Defendant went to a friend's house. Later, they decided to drive to Dale's. Mr. Pitts said that he was too impaired to be driving, having consumed about fourteen beers throughout the day.

As the Defendant pulled up to Dale's in the northbound lane, a car passed in the southbound lane. The Defendant activated her left turn signal and began to turn. Mr. Pitts saw the victims' bike only an instant before impact, and he felt glass hit him in his face. In a statement he later gave to police, Mr. Pitts said that the "motorcycle didn't have a headlight on. We couldn't see anything coming." He did not mention another car in the statement. After the crash, the Defendant ran into Dale's to call 911, but she discovered that someone already had done so.

Registered Nurse Sandra Payne, an employee of Wayne Medical Center, had known the Defendant for several years and saw her in the emergency room on the evening of the crash. The Defendant was crying and upset. Nurse Payne sat with the Defendant for about thirty minutes, noticing nothing unusual about her speech or demeanor except for the anxiety and fear one would expect after a crash. The Defendant asked Nurse Payne, "Is it bad?" Nurse Payne, believing that the Defendant was inquiring about Ms. Maynard's condition, replied, "It's not good."

Mike Mitchell, the owner of a motorcycle repair shop, also testified after being certified as an expert in all aspects of motorcycle repair and maintenance. He examined the victims' motorcycle and held it in dry storage. He noted that the motorcycle's tachometer showed a reading of 10,000 revolutions per minute ("rpm"), and that its engine was in fourth gear. He estimated that the motorcycle in fourth gear would travel about 125 miles per hour at 10,000 rpm. He also noted that the motorcycle may not have been in fourth gear immediately before impact, and that there is no correlation between speed and rpm if a motorcycle driver holds in the clutch, as State's witnesses testified Mr. Dickey had done.

Cecil Pitts, the Defendant's aunt and owner of the property on which the July 3, 2005 creek party was held, testified that she saw the Defendant at the creek party and observed nothing unusual about her demeanor.

The Defendant chose to testify and gave her account of relevant events. She clarified that she knew both victims; Mr. Dickey was her husband's second cousin, and Ms. Maynard was Mr. Dickey's girlfriend. Mr. Dickey was "like a brother" to the Defendant's husband. The Defendant had frequently spent time with both victims.

The Defendant woke up at about 10:00 a.m. on July 3, 2005. At 11:00 a.m., she spent a couple of hours with her disabled mother, after which she went to her family's creek party. At about 4:30 p.m., she had two sips of a wine cooler at the suggestion of a friend. She had no other alcohol

that day and did not consume any drugs. At some point not long thereafter, she went to the store to buy beer for her nephew. After returning to the party, she spent more time with her family. She, her husband, and Mr. Pitts left the party during daylight and went to her home. They talked outside for a while and then proceeded inside. Later, Mr. Pitts said he did not feel well and wanted to be driven home. The Defendant told her husband she would stop at Dale's on the way and pick up some things.

The Defendant came to a full stop as she prepared to turn left into Dale's from the northbound lane. A southbound truck passed by. As was her habit when carrying a passenger, she said, "Well, it looks clear." She saw the motorcycle immediately before the impact. The Defendant got out of her SUV and, seeing what had happened, said, "Oh my God." She started shaking and crying. The Defendant did not yet realize the identities of the victims, but she began to suspect who they were once she learned that both a man and a woman had been on the motorcycle. She pulled her SUV into the Dale's parking lot.

The Defendant saw a woman run up to Mr. Dickey's body and tear his shirt to check his wounds. A man then yelled that there was a woman in a nearby ditch. The Defendant ran into the store to call 911 but learned that someone had already done so. She then went back outside and sat down near her SUV's flat tire. At some point, she realized Mr. Dickey was the male victim and knew that the female would be Ms. Maynard. The Defendant testified that the crash was not caused by any intoxication on her part; she noted that the bright lights from the Dale's parking lot may have made it more difficult for her to see.

On cross-examination, the Defendant affirmed that she had not mentioned a passing vehicle in her statement to police. She also said that she had checked on the condition of the victims at the scene. She never called either victim's family because they had made it known they did not want her to contact them or attend either funeral. She confirmed that she had smoked a small amount of methamphetamine with Ms. Maynard on July 1, 2005. Ms. Maynard had provided the methamphetamine. She estimated she smoked methamphetamine once a year and only smoked a little each time.

## **Analysis**

### **I. Sufficiency of the Evidence**

Tennessee Rule of Appellate Procedure 13(e) prescribes that "[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt." A convicted criminal defendant who challenges the sufficiency of the evidence on appeal bears the burden of demonstrating why the evidence is insufficient to support the verdict, because a verdict of guilt destroys the presumption of innocence and imposes a presumption of guilt. See State v. Evans, 108 S.W.3d 231, 237 (Tenn. 2003); State v. Carruthers, 35 S.W.3d 516, 557-58 (Tenn. 2000); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This Court must reject a convicted criminal defendant's challenge to the sufficiency of the evidence if, after considering the evidence in a light most favorable to the prosecution, we determine that any rational trier of fact could have found the essential elements of

the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Hall, 8 S.W.3d 593, 599 (Tenn. 1999).

On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. See Carruthers, 35 S.W.3d at 558; Hall, 8 S.W.3d at 599. A guilty verdict by the trier of fact accredits the testimony of the State's witnesses and resolves all conflicts in the evidence in favor of the prosecution's theory. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). Questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this Court will not re-weigh or re-evaluate the evidence. See Evans, 108 S.W.3d at 236; Bland, 958 S.W.2d at 659. Nor will this Court substitute its own inferences drawn from circumstantial evidence for those drawn by the trier of fact. See Evans, 108 S.W.3d at 236-37; Carruthers, 35 S.W.3d at 557.

Vehicular homicide by intoxication is the reckless killing of another by the operation of an automobile as the proximate result of the driver's intoxication as set forth in Tennessee Code Annotated section 55-10-401. See Tenn. Code Ann. § 39-13-213(a)(2). Tennessee Code Annotated section 55-10-401(a)(1) makes it illegal for any person to drive or be in physical control of any automobile while "[u]nder the influence of any intoxicant, marijuana, narcotic drug, or drug producing stimulating effects on the central nervous system."

We first conclude that the evidence was sufficient to establish that the Defendant was under the influence of methamphetamine at the time of the crash. We note that no expert witness testified that a blood methamphetamine level of .1 micrograms per milliliter would necessarily have impaired the Defendant; Dr. Levy testified, however, that such a level would impair an average person who had not built up a methamphetamine tolerance. The Defendant testified that she used methamphetamine only about once a year, allowing a rational jury to conclude that she was such an "average person" despite witnesses' agreement that the Defendant exhibited no obvious signs of intoxication after the crash.

We also conclude that a rational jury could have found that the crash proximately resulted from the Defendant's intoxication. The impact occurred in an area relatively well-lit by the lights in the adjacent Dale's parking lot. The State presented testimony that the victims' motorcycle model included automatically activated headlights and that those headlights could not be turned off. Further, the Defendant would have had the opportunity to see the victims' motorcycle while it traveled along an unobstructed 950-foot line of sight, a distance that would have taken the motorcycle about ten seconds to traverse at sixty miles per hour. Although the evidence is not overwhelming, we conclude that, under these conditions, it was sufficient for a rational jury to find that the Defendant's intoxication proximately caused the crash beyond a reasonable doubt.

## **II. Jury Review of Testimony**

During deliberations, the jury asked the court to play back part of Dr. Levy's recorded testimony. The trial court complied. The Defendant did not object, and has thus waived this issue.



See Tenn. R. App. P. 36(a) (stating that “[n]othing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error”). We must also consider, however, whether the Defendant has established plain error. See Tenn. R. App. P. 52(b). Plain error requires that five factors be established: (1) “the record must clearly establish what happened in the trial court”; (2) “a clear and unequivocal rule of law must have been breached”; (3) “a substantial right of the accused must have been adversely affected”; (4) “the accused did not waive the issue for tactical reasons”; and (5) “consideration of the error is necessary to do substantial justice.” State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994).

The Defendant argues that the trial court erred by failing to play back all of Dr. Levy’s testimony, thus violating Tennessee Rule of Evidence 106, which states that “[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.”

By its plain language, Rule 106 applies to introduction, rather than jury review, of evidence. It also does not require a trial court to take any action in the absence of a request from an adverse party. Because the trial court did not violate a clear and unequivocal rule of law, the Defendant cannot demonstrate plain error. See Adkisson, 899 S.W.2d at 641-42. This issue is without merit.

### **III. Testimony Regarding Federal Law**

The State engaged in the following exchange with Dr. Smith during cross-examination:

[The State]: Are you saying that if you were hired by a truck driver’s company and you tested him and found out that he had [.1 micrograms] of methamphetamine in his system, you would be comfortable with telling him to crawl back into the cab –

[Dr. Smith]: Absolutely not. Federal law prohibits any methamphetamine in anybody. It’s a Federal law. It’s not whether they are impaired. It’s Federal law.

The Defendant did not object to this testimony. She did object, however, when the State referenced this portion of Dr. Smith’s testimony in its closing argument. Following an unrecorded bench conference, the court noted the Defendant’s objection but apparently overruled it.

In her brief, the Defendant argues that the trial court erred at the time Dr. Smith gave this testimony. Attempting to avoid her evident waiver of the issue at that time, however, the Defendant appears to argue in her reply brief that her objection to the testimony’s reappearance in the State’s closing argument should suffice to preserve the issue on appeal. It does not, as preservation of this issue required a contemporaneous objection. See State v. Schiefelbein, 230 S.W.3d 88, 118 (Tenn. Crim. App. 2007). This issue is therefore waived. See Tenn. R. App. P. 36(a).

The Defendant has also not demonstrated plain error. After a review of the record, we cannot conclude that testimony regarding the illegality of methamphetamine use, regardless of its relevance, prejudiced the Defendant. This issue is therefore without merit.

#### **IV. Untrue Testimony**

The Defendant next argues that Agent Hall's characterization of .1 micrograms per milliliter of methamphetamine as "on the upper end of what [she had] seen" was "false and unsupported by evidence." He bases this conclusion on the testimony of Dr. Levy and Dr. Smith, who both stated that they regularly saw levels well above .1 micrograms per milliliter. Agent Hall simply testified regarding her personal experience, however, and she did not contend that .1 micrograms per milliliter of methamphetamine was on the upper end of possible results. As such, the testimony of Dr. Smith and Dr. Levy does nothing to establish that Agent Hall's testimony was false. Even if Agent Hall's testimony was erroneous, the Defendant had the opportunity to expose inconsistencies through examination of Agent Hall and other expert witnesses.

After trial, the Defendant subpoenaed records of Agent Hall's test results in an effort to support his amended motion for a new trial. The trial court granted the State's motion to quash this subpoena as unreasonable and cost-prohibitive, however. The Defendant contends that Agent Hall's testimony prejudiced her by leading the jury to believe that .1 micrograms per milliliter was an extremely large quantity of methamphetamine. Again, Agent Hall testified that the quantity was large relative to other results she had seen; Dr. Smith and Dr. Levy later added that methamphetamine blood levels substantially higher than .1 micrograms per milliliter were, in their experience, not unusual. The jury therefore had information before it establishing a wide range of common methamphetamine levels, and we conclude the trial court did not abuse its discretion in quashing the Defendant's subpoena. This issue is without merit.

#### **V. Prosecutorial Misconduct in Opening Statement**

As part of its opening statement, the State told the jury, "You're going to hear these same witnesses describe to you how the [D]efendant acted after the accident. And, how she carried on and what she did immediately after the accident." The Defendant contends that the State committed prosecutorial misconduct in making this statement because it "[drew] conclusions about [her] state of mind after the accident . . . ."

The Defendant has waived this issue by failing to make a contemporaneous objection. See Tenn. R. App. P. 36(a). We must decide whether this statement constitutes plain error, however. After a thorough examination of the State's arguments, we are unable to locate any portion of the statement that improperly draws conclusions about the Defendant's state of mind after the accident, as she claims. This issue is without merit.

#### **VI. Admission of Victim's Blood Test**

As detailed previously, the trial court denied the Defendant's request to admit Ms. Maynard's blood test results, instead allowing the Defendant to question expert witnesses on the existence and

effect of a hypothetical methamphetamine level corresponding to Ms. Maynard's. The Defendant contends that this denial was error.

Only relevant evidence is admissible. See Tenn. R. Evid. 402. Tennessee Rules of Evidence 401 and 403 govern whether evidence is relevant. Trial courts have broad discretion in assessing relevance, and we will not overturn their decisions absent an abuse of discretion below. State v. Stinnet, 958 S.W.2d 329, 331 (Tenn. 1997), State v. Dubose, 953 S.W.2d 649, 653 (Tenn. 1997). The trial court's exercise of discretion may not be reversed unless the court "applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining." State v. Shuck, 953 S.W.2d 662, 669 (Tenn. 1997).

"'Relevant evidence' means any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. The Defendant argues that Ms. Maynard's blood test results were relevant because it "could have corroborated a material issue, that is, that the Defendant did this drug more than two days prior. The level in the victim/passenger was thirteen times greater, which is evidence that [Ms. Maynard] was the possessor of the drug and took more, not the Defendant." We disagree with the contention that Ms. Maynard's blood test results render more probable the Defendant's contention that she used methamphetamine two days before the crash. Further, the fact that Ms. Maynard possessed methamphetamine and used more than the Defendant does not render the Defendant's intoxication at the time of the crash more or less probable. We conclude the trial court did not abuse its discretion in finding Ms. Maynard's blood test results irrelevant, as the evidence established she was simply a passenger on Mr. Dickey's motorcycle and took no action contributing to the crash.

During deliberations, the jury asked the trial court for permission to see Ms. Maynard's blood test results. The trial court denied the jury's request. The Defendant cites no authority, and we know of none, suggesting why it was error for the trial court to deny the jury's request to examine evidence previously held to be irrelevant. This issue is without merit.

## **VII. Denial of Alternative Sentencing**

On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. See Tenn. Code Ann. § 40-35-401, Sentencing Comm'n Comments; see also State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001). When a defendant challenges the length, range, or manner of service of a sentence, it is the duty of this Court to conduct a de novo review on the record with a presumption that the determinations made by the court from which the appeal is taken are correct. Tenn. Code Ann. § 40-35-401(d). However, this presumption "is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Pettus, 986 S.W.2d 540, 543-44 (Tenn. 1999); see also State v. Carter, 254 S.W.3d 335, 344-45 (Tenn. 2008). If our review reflects that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely de novo without the presumption of correctness. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see also Carter, 254 S.W.3d at 344-45.

In conducting a de novo review of a sentence, this Court must consider (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; (f) any statistical information provided by the Administrative Office of the Courts as to Tennessee sentencing practices for similar offenses; and (g) any statement the defendant wishes to make in the defendant's own behalf about sentencing. Tenn. Code Ann. § 40-35-210(b); see also Carter, 254 S.W.3d at 343; State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002).

Effective June 7, 2005, our legislature amended Tennessee Code Annotated section 40-35-102(6) by deleting the statutory presumption that a defendant who is convicted of a Class C, D, or E felony, as a mitigated or standard offender, is a favorable candidate for alternative sentencing. Our sentencing law now provides that a defendant who does not possess a criminal history showing a clear disregard for society's laws and morals, who has not failed past rehabilitation efforts, and who "is an especially mitigated or standard offender convicted of a Class C, D or E felony, *should* be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. A court shall consider, but is not bound by, this advisory sentencing guideline." Tenn. Code Ann. § 40-35-102(5), (6) (emphasis added). No longer is any defendant entitled to a presumption that he or she is a favorable candidate for alternative sentencing. Carter, 254 S.W.3d at 347.

The following considerations provide guidance regarding what constitutes "evidence to the contrary":

(A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant . . . .

Tenn. Code Ann. § 40-35-103(1); see also Carter, 254 S.W.3d at 347. Additionally, the principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence is imposed. Tenn. Code Ann. § 40-35-103(2), (4). The court should also consider the defendant's potential for rehabilitation or treatment in determining the appropriate sentence. Tenn. Code Ann. § 40-35-103(5).

The judgments entered by the trial court reflect that the court ordered the Defendant to serve her eight-year sentence in the Department of Correction. The Defendant contends that the trial court erred by denying her request for alternative sentencing. The record, however, does not contain a transcript of the trial court's sentencing ruling or any sentencing order or memoranda explaining why it chose to sentence the Defendant to confinement.

An appealing party has a duty to provide a complete record to enable meaningful appellate review. See Tenn. R. App. P. 24. As the Defendant has failed to do so, we are unable to consider this issue. See State v. Matthews, 805 S.W.2d 776, 784 (Tenn. Crim. App. 1990). When the record is incomplete, we must presume that the judgment of the trial court was correct. Id.

### **Conclusion**

Based on the foregoing authorities and reasoning, we affirm the Defendant's convictions and sentence.

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DAVID H. WELLES, JUDGE